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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

JASBIR GILL, MAHMOUD KEDKAD,

Plaintiffs,

v.

KNOWLEDGESTORM, INC., a corporation, DOES 1through 50,

Defendants.

Case No. C 07-04112 PVT

DEFENDANT KNOWLEDGESTORM, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AGAINST PLAINTIFF MAHMOUD KEDKAD; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 3, 2008
Time 10:00 a.m.
Crtrm: 5, 4th floor

Action filed: July 13, 2007
Trial date: August 4, 2008

TO PLAINTIFF MAHMOUD KEDKAD AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 3, 2008, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 5, 4th floor of the United States District Court, Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, California 95113, defendant KnowledgeStorm, Inc. ("Defendant") will and does hereby apply to this court for an order granting summary judgment in its favor and against plaintiff Mahmoud Kedkad ("Plaintiff").

This motion is made on the grounds that Plaintiff's claim for racial harassment against Defendant has no merit, that there is no triable issue of material fact as to the legal issues raised therein, and that Defendant is entitled to judgment on Plaintiff's claim for racial harassment as a matter of law.

In the alternative, Defendant will move, and by this motion hereby does move, this court for an order granting partial summary judgment in its favor and against Plaintiff with respect to the following issues:

Issue One: Defendant is entitled to partial summary judgment in its favor and against Plaintiff on his cause of action for racial harassment because Plaintiff cannot establish a prima facie case as a matter of law. (Facts 1-75.)

Issue Two: Defendant is entitled to partial summary judgment in its favor and against Plaintiff on his cause of action for racial harassment because Plaintiff could have avoided any alleged harassment if he had complied with Defendant's No-Harassment Policy as a matter of law. (Facts 1-75.)

This motion is based upon this notice of motion and motion, the memorandum of points and authorities, the separate statement of uncontroverted facts, the evidence submitted in support of the this motion, all papers and pleadings filed by the parties herein, and upon any other oral or documentary evidence that may be timely presented prior to or at the hearing of this motion.

Dated: April 29, 2008

FORD & HARRISON LLP

By: /s/ Steven M. Kroll
Jeffrey D. Mokotoff
Steven M. Kroll
Attorneys for Defendant
KNOWLEDGESTORM, INC.

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I. INTRODUCTION

Plaintiff Mahmoud Kedkad ("Kedkad"), who is Middle Eastern, asserts his remaining claim of racial harassment in violation of the California Fair Employment and Housing Act (FEHA) against defendant KnowledgeStorm, Inc. ("KnowledgeStorm").[1] Kedkad worked as a sales executive out of the company's South San Francisco office for approximately a year from November 2006 to December 2007. During the first five months of his employment, Kedkad alleges his supervisor, Joe Brown, who worked out of the company's Atlanta office, verbally harassed him during his periodic sales visits. However, the conduct of which Kedkad complains does not rise to the level of unlawful harassment under the FEHA. Particularly, Brown's alleged remarks were neither "because of" Kedkad's race, nor "sufficiently severe or pervasive" to alter the conditions of Kedkad's employment and create an abusive working environment.

Moreover, Kedkad never properly reported the alleged harassment pursuant to the company's No-Harassment policy until months later when *he* was the subject of a harassment complaint by a coworker. Although KnowledgeStorm contends Kedkad fabricated these allegations in response to the investigation of harassment against him, he could have avoided any alleged harassment during the first part of his employment by complying with the company's formal complaint procedures for reporting harassment. Nevertheless, even taking his allegations in the light most favorable to him, Kedkad's racial harassment claim fails as a matter of law.

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[1] Kedkad's attorney of record advised KnowledgeStorm that Kedkad is no longer pursuing a retaliation claim against KnowledgeStorm. (Kedkad Depo., p. 92:17-94:6; Ex. A - Kreger letter.) Kedkad is not pursuing a wrongful termination claim against KnowledgeStorm. (Complaint, ¶¶ 33-37; Ex. B & C - Kedkad's Response to Request for Admission, No. 20). Accordingly, Kedkad's sole claim against KnowledgeStorm is one for racial harassment.

II. STATEMENT OF FACTS

A. The Parties and Witnesses

Kedkad is a Middle Eastern male who was born in Libya. (Fact 1.)

KnowledgeStorm was a company that provided search resources for technology solutions and information. It gave technology vendors opportunities to reach business and technology professionals as they conducted research online and gave contact information that converted them into web leads. (Fact 2.)

Kelly Gay was the chief executive office and president of KnowledgeStorm. (Fact 3.) Mike Ewers was its vice president of finance and human resources. (Fact 4.) Jim Canfield was its vice president of sales. (Fact 5.) Jason Hoback was its director of sales, reporting to Canfield. (Fact 6.) Joe Brown was its western regional sales manager, reporting to Hoback. (Fact 7.)

Joseph Niederberger, Lisa McGuire, Katie Kimball, Rachel Gordon, and co-plaintiff Jasbir Gill were sales executives of KnowledgeStorm and coworkers of Kedkad. (Fact 8.)

B. Kedkad's Employment with KnowledgeStorm

On or about October 20, 2006, Kedkad interviewed with several employees of KnowledgeStorm at its headquarters in Atlanta, Georgia. (Fact 9.) On October 30, 2006, Brown offered Kedkad a sales executive position with the company. (Fact 10.) Kedkad accepted the offer. (Fact 11.) He began working for KnowledgeStorm on or about November 20, 2006. (Fact 12.)

Kedkad worked out of KnowledgeStorm's South San Francisco office. (Fact 13.) There were approximately eight employees working in cubicles in this office. (Fact 14.) Kedkad had a good working relationship with most of his coworkers and, as time went on, he believed he had a "better working relationship" with coworkers McGuire, Kimball, Gordon, and co-Plaintiff Gill. (Fact 15.)

Kedkad reported directly to Brown. (Fact 16.) However, Brown did not work out of the South Francisco office. (Fact 17.) He worked out of the Atlanta

office. (Fact 18.) Brown traveled to the South San Francisco office once every two or three weeks. (Fact 19.)

Kedkad thought "[he] was a good salesman" at KnowledgeStorm. (Fact 20.) Brown openly praised Kedkad for his sales efforts at the company. (Fact 21.) Kedkad was an above quota sales performer for the first quarter of 2007. (Fact 22.) Kedkad readily described himself as being "hard-working" and "very successful," during this quarter. (Fact 23.) Kedkad does not "live [his] life based on what other people think." (Fact 24.)

C. KnowledgeStorm's No-Harassment Policy

After his hire, Kedkad attended a training from on or about December 4 to 8, 2006, in the Atlanta office. (Fact 25.) During the training, KnowledgeStorm held a presentation on its employment policies and procedures, including its No-Harassment policy. (Fact 26.) At the training or at some other time in 2006, Kedkad received a copy of KnowledgeStorm's employee handbook ("Handbook").[2] (Fact 27.) The Handbook included a No-Harassment policy that required an employee who "is being harassed . . . or believes his/her employment is being adversely affected by such conduct" to "immediately report their concerns to" either "Mike Ewers, Vice-President" or "Kelly Gay, CEO." (Fact 28.)

D. Alleged Harassment by Joe Brown

1. *Alleged statements witnessed by Kedkad*

Kedkad claims Brown harassed him because of his race. (Complaint, ¶¶ 5-22). During the second or third week in December 2006, Kedkad allegedly overheard Brown say to Niederberger, "What do you think of the camel jockey

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[2] Only when Kedkad's attorney of record improperly coached Kedkad, by interrupting Kedkad's cross-examination to ask KnowledgeStorm's counsel, "Do you have a signed acknowledgment," did Kedkad subsequently change his testimony and state that he now did "not recall receiving" the Handbook. (Kedkad Depo., p. 60:4-12)

we've hired? Why don't you take the swat on him so he can start making some calls?" (Fact 29.) Brown was allegedly speaking with Niederberger at Niederberger's cubicle. (Fact 30.) Kedkad was walking by when he heard Brown's alleged remark. (Fact 31.) Kedkad did not know the context of the remark; he was not a part of the conversation. (Fact 32.) Kedkad thought the statement was about him because he was "self-conscious about making phone calls." (Fact 33.) Kedkad never heard Brown use the term "camel jockey" on any other occasion. (Fact 34.) However, Kedkad has heard that term "all the time" outside of his employment. (Fact 35.)

In the middle of January 2007, Brown allegedly made comments about Kedkad's clothes. On one day, Brown allegedly asked Kedkad, "Why are you dressed like this? You think you're in the Middle East?" (Fact 36.) Kedkad was not wearing anything distinctive to the Middle East. (Fact 37.) He was wearing "a long shirt and pants, a heavy shirt." (Fact 38.) Kedkad did not say anything in response. (Fact 39.)

One or two days later, Kedkad arrived at work wearing a light jacket that was long. (Fact 40.) Brown allegedly asked Kedkad, "What is this funny weird clothes you're wearing?" (Fact 41.) There was nothing distinctive about Kedkad's jacket that would suggest it was Middle Eastern. (Fact 42.) Kedkad told Brown "that this is a style here." (Fact 43.)

During the third week of February 2007, Brown and Kedkad were having a conversation on different topics including about foreigners living in the bay area. (Fact 44.) In this conversation, Brown allegedly told Kedkad that he thought there were many Indians and how they were taking all the jobs to the point were he hates them. (Fact 45.) Kedkad did not say anything in response. (Fact 46.)

At the end of March 2007, Kedkad and Brown met with a prospective client. (Fact 47.) After the meeting, while walking outside of the client's office building, Kedkad asked Brown what he thought of the meeting. (Fact 48.) Brown allegedly

stated, "You know, I think you should go back to school, learn some English, read and write so you can speak normal like us. You'll really be successful. You need it." (Fact 49.) Kedkad allegedly asked Brown, "Why do you think that?" (Fact 50.) Brown allegedly said that Hoback told him Kedkad made too many mistakes in his proposals. (Fact 51.) Kedkad allegedly told Brown that he "made one mistake in a company's name, one line in a company's name, and [Hoback] pointed it out to [him] and it was corrected." (Fact 52.)

2. *Alleged statements never witnessed by Kedkad*

On February 21, 2007, the employees in the South San Francisco office attended a party after work. (Fact 53.) Kedkad did not attend the party. (Fact 54.) His coworkers allegedly told him about the party the next day. (Fact 55.) McGuire allegedly told Kedkad that Brown told her at the party that Kedkad was not invited because he would be "scoping out terrorist targets." (Fact 56.)

At some time after the week of March 26, 2007, co-plaintiff Gill allegedly told Kedkad that Brown told her that "all Muslims are terrorists." (Fact 57.) However, Kedkad did not witness Brown making this comment. (Fact 58.) There is no testimony that Kedkad is Muslim, or that Joe Brown understood Kedkad was or was not Muslim.

At some time toward the end of April or beginning of May 2007, co-plaintiff Gill allegedly told Kedkad that she heard from Niederberger that Brown referred to Kedkad as a "sand nigger." (Fact 59.) However, Kedkad never heard Brown use the term "sand nigger." (Fact 60.) Gill also never heard Brown use the term "sand nigger." (Fact 61.)

E. <u>Kedkad's Alleged Report of Harassment to Hoback</u>

Kedkad allegedly told Hoback of the "camel jockey" and "dress" comments at the end of January 2007. (Fact 62.) He allegedly told Hoback about the "scoping out terrorist targets" comment at the end of March 2007. (Fact 63.) Kedkad allegedly told Hoback about the "Indians in the area" remark in late March

2007. (Fact 64.) He allegedly told Hoback of the March 2007 "learn some English" comment in the beginning of *February* 2007. (Fact 65.)

F. Miller's Harassment Complaint Against Kedkad

On the morning of April 25, 2007, Elysse Miller, the new business development representative ("BDR") assigned to help Kedkad with his sales, had a telephone conversation with Kedkad. (Fact 66.) After this conversation, Miller reported to KnowledgeStorm that Kedkad told her, among other things, "I wish I didn't have a woman as a BDR," or words to that effect. (Fact 67.) That same afternoon, Gay interviewed Miller concerning her report. (Fact 68.)

Gay interviewed Kedkad the following day on April 26, 2007. (Fact 69.) During the interview, Kedkad advised Gay, for the first time, that he believed there was discrimination ongoing in the South San Francisco office. (Fact 70.)

G. Kedkad's Report of Brown to Gay

71. Immediately after completing her interview of Kedkad regarding Miller's complaint, Gay commenced an investigation into Kedkad's complaint of discrimination. (Fact 71.) During the evening of April 26, 2007, Gay spoke with Kedkad regarding his complaint. (Fact 72.) KnowledgeStorm also interviewed Joe Brown, Jason Hoback, Kevin Cummings, Rachel Gordon, Rick Neigher, Tracy Mikolajewski, Matt Hart, and Emily Crume. (Fact 73.) KnowledgeStorm concluded that Brown did not engage in any discriminatory behavior. (Fact 74.) To minimize any further interaction between Brown and Kedkad, KnowledgeStorm began having Kedkad report to Canfield, beginning May 2007. (Fact 75.)

III. SUMMARY JUDGMENT STANDARD

The moving party must demonstrate that no genuine issue of material fact exists for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). However, the moving party is not required to *negate* those portions of the nonmoving party's claim on which the nonmoving party bears the burden of proof. Id. Once the moving party demonstrates that there is no genuine issue of material fact, the

nonmoving party must designate "specific facts showing that there is a genuine issue for trial." Id. at 324. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

Plaintiff's bald assertion that a genuine issue of material fact exists does not preclude summary judgment. Harper v. Wallingford, 877 F.2d 728 (9th Cir. 1989). The mere existence of alleged factual disputes cannot defeat an otherwise properly supported motion. Rather, the factual dispute or disputes must be material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986).

IV. ARGUMENT

A. Plaintiff's Racial Harassment Claim Is Without Merit Because He Cannot Establish a Prima Facie Case of Racial Harassment

Under the FEHA, it is an unlawful employment practice "[f]or an employer…or any other person, because of race…to harass an employee…" Cal. Gov. Code, § 12940(j)(1).

To establish a prima facie case of racial harassment, an employee must show that: (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based upon his race; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior. Guthrey v. State of California, 63 Cal.App.4th 1108, 1122-1123 (1998); Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 608 (1989).

1. *The conduct complained of by Plaintiff was not "because of" his race*

The FEHA does not prohibit all harassment in the workplace; it is directed at unlawful harassment "because of race." Cal. Gov. Code, § 12940(j)(1); Aguilar v. Avis Rent A Car System, Inc., 21 Cal.4th 121, 129-131 (1999). "[I]t is the disparate treatment of an employee on the basis of [race] – not the mere discussion

of [race]… – that is the essence of a [racial] harassment claim." Lyle v. Warner Bros. Television Prods., 38 Cal.4th 264, 279-282 (2006) [harassment because of sex].

Here, the conduct complained of by Kedkad was not *because of* his race. With regard to the alleged "camel jockey" remark, there is no admissible evidence that it was even in reference to Kedkad. He allegedly *overheard* the remark in a private conversation between Brown and Niederberger while walking by them. Kedkad was not a part of the conversation and did not even know the context of the remark. He only assumed the alleged statement was about him because he was purportedly "self-conscious about making phone calls."

With regard to the alleged "dress" remarks, there is no admissible evidence that it was in reference to Kedkad's race. The remarks were about his *clothes*. On the first occasion, Kedkad was wearing "a long shirt and pants, a heavy shirt." On the second occasion, he was wearing a light jacket that was long. Brown's remarks were not racial epithets, derogatory comments or slurs. Cal. Code Regs., tit. 2, § 7287.6(b)(1)(A).

With regard to the "Indians in the area" remark, there is no evidence whatsoever that it was in reference to Kedkad's race. He is not Indian, but Middle Eastern. Kedkad was even admittedly talking about foreigners in the bay area openly with Brown when the alleged remark was made. Kedkad did not even say anything in response. Brown's remark was not a racial epithet, derogatory comment or slur. Cal. Code Regs., tit. 2, § 7287.6(b)(1)(A).

With regard to the "learn some English" remark, there is no admissible evidence that it was in reference to Kedkad's race. The remark was about his *communication skills*. After the prospective client meeting, Kedkad asked Brown what he thought of the meeting. Brown allegedly stated Kedkad should learn some more English because Hoback informed him that Kedkad made many mistakes in his proposals. Again, Brown's remark was not a racial epithet, derogatory

comment or slur. Cal. Code Regs., tit. 2, § 7287.6(b)(1)(A).

With regard to the alleged "scoping out terrorist targets," "all Muslims are terrorists," and "sand nigger" remarks, they are all inadmissible hearsay. Kedkad admittedly never witnessed Brown making any of them. Indeed, they were all communicated to Kedkad by or through his coworkers (e.g., double and triple hearsay). See Section II.C.2. As Kedkad cannot rely upon inadmissible hearsay or workplace gossip to establish an unlawful hostile work environment, these alleged remarks are irrelevant to this analysis and cannot be considered by the court. Martinez v. Marin Sanitary Service, 349 F. Supp.2d 1234, 1248 (N.D. Cal. 2004) [holding "[i]ncidents of harassment predicated on inadmissible hearsay are not proper for the court to consider in evaluating the hostility of [the plaintiff's] workplace"]; Beyda v. City of Los Angeles, 65 Cal.App.4th 511, 521 (1998) [holding "mere workplace gossip is not a substitute for proof. Evidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule"].

The same actor presumption, which is applied in employment discrimination cases, lends further reasoning why the conduct complained of by Kedkad was not *because of* his race. In California, it is well established that "'[w]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time,[3] a strong inference arises that there was no discriminatory motive.'" Horn v. Cushman & Wakefield Western, Inc., 72 Cal.App.4th 798, 809 (1999) (citations omitted); West v. Bechtel Corp., 96 Cal.App.4th 966, 980-981 (2002).

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[3] While the passage of time eventually attenuates this same actor presumption, the California courts have held the presumption to last for years. Horn, 72 Cal.App.4th at 809, fn. 7 [holding "five years is relatively short time and is not so long a time as to attenuate the presumption"]; West, 96 Cal.App.4th at 981 [applying the presumption with "particular force" where the employer fired the employee just after a month of employment].

Under the instant facts, Brown is both the person who made the decision to hire Kedkad and the person who allegedly harassed him over an approximate five-month period of time immediately after his hiring. As such, if Brown had a discriminatory animus against Middle Easterners, "'[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire [or harass] them once they are on the job.'" Horn, 72 Cal.App.4th at 809 (emphasis added) (citations omitted); West, 96 Cal.App.4th at 980-81.

Thus, there is no evidence to satisfy this element of Kedkad's racial harassment claim as a matter of law.

2. *The conduct complained of by Plaintiff was not "sufficiently severe or pervasive" to alter his conditions of employment and create an abusive working environment*

Assuming *arguendo* Brown's remarks were because of race, Kedkad cannot establish that the complained of conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

To show an unlawful hostile work environment exists, the employee must show that he was subjected to comments which are sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. Aguilar, 21 Cal.4th at 130-131. "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents [racial] harassment law from being expanded into a 'general civility code.'" Jones v. Department of Corrections and Rehabilitation, 152 Cal.App.4th 1367, 1377 (2007) (citation omitted).

The employee must meet both an objective and subjective standard, including whether a "reasonable person" would find the conduct offensive. Beyda, 65 Cal.App.4th at 518. The "totality of the circumstances" must be analyzed. The

factors include: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating or whether it was a mere offensive utterance; and (4) whether the conduct unreasonably interfered with plaintiff's work performance. Etter v. Veriflo Corp., 67 Cal.App.4th 457, 466 (1998).

An employee *cannot* recover for harassment that is "occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." Lyle, 38 Cal.4th at 283; Aguilar, 21 Cal.4th at 131; Fisher, 214 Cal. App. 3d at 610. That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. Lyle, 38 Cal.4th at 283; Martinez, 349 F. Supp.2d at 1252 [stating "evidence of only a few specific racially-charged incidents is usually insufficient to support a claim for an objectively unreasonable hostile work environment"]; Vasquez v. County of Los Angeles, 349 F.3d 634, 642-643 (9th Cir. 2001) [holding that, although plaintiff claimed that he was continually harassed, he provided specific factual allegations regarding only a few discrete incidents, which were insufficient].

Moreover, when a plaintiff cannot point to a loss of tangible job benefits, he must make a "'commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.'" Lyle, 38 Cal.4th at 284 (quoting Fisher, 214 Cal. App. 3d at 610).

Here, there is no evidence that a "concerted pattern of harassment of a repeated, routine, or a generalized nature" existed in the South San Francisco office. First, Brown's alleged remarks were infrequent. Brown did not even work out of that office. He worked out of the Atlanta office, and traveled to the South San Francisco office once every two or three weeks. Kedkad only alleges that the racially harassing conduct occurred when Brown visited the South San Francisco office.

Over a year of employment, Kedkad witnessed Brown make only five remarks that Kedkad attributes or connects to his race.[4] Brown made the alleged "camel jockey" remark to Niederberger during the second or third week in December 2006. Approximately 30 days later, Brown made the alleged "dress" remarks in mid-January 2007, one or two days apart. Next, approximately 30 days later, Brown made the alleged "Indians in the area" remark at the end of February 2007. Lastly, approximately 30 days later, Brown made the alleged "learn some English" comments at the end of March 2007. Thus, Brown's alleged remarks were plainly occasional or sporadic and cannot support a hostile environment claim. Martinez, 349 F. Supp.2d at 1252; Vasquez, 349 F.3d at 642-643.

Second, Brown's alleged racial remarks were not severe. With regard to the alleged "camel jockey" remark, which is arguably the most severe, Kedkad merely *overheard* it in a private conversation between Brown and Niederberger while he walking by them. He was not a part of the conversation and did not even know the context of the remark. He only assumed the statement was about him. Kedkad also never heard Brown use the term on any other occasion. Although the remark might have engendered offensive feelings in Kedkad, he has admittedly heard that term "all the time" outside of his employment and, notably, waited over 30 days allegedly to report it to Hoback at the end of January 2007.

With regard to the alleged "dress" remarks, they were mere references to Kedkad's *clothes*. On the first occasion, Kedkad was wearing "a long shirt and pants, a heavy shirt." He did not even respond to Brown. One or two days later, on the second occasion, Kedkad was wearing a light jacket that was long. He simply told Brown "that is a style here" the second time. Although these remarks might

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[4] As Kedkad never witnessed the alleged "scoping out terrorist targets," "all Muslims are terrorists," and "sand nigger" remarks, these remarks are also irrelevant to this analysis. Martinez, 349 F. Supp.2d at 1248; Beyda, 65 Cal.App.4th at 521.

have engendered offensive feelings in Kedkad, he admittedly waited a couple of weeks before allegedly reporting them to Hoback.

With regard to the "Indians in the area" remark, it was a reference to Indians, not Middle Easterners. At the time, Brown and Kedkad were even having an open conversation on different topics, including about foreigners living in the area. Kedkad might not have appreciated Brown's remark, but he certainly solicited it. Although these remarks might have engendered offensive feelings in Kedkad, he admittedly waited over 30 days before allegedly reporting it to Hoback.

With regard to the "learn some English" comment, according to Kedkad, it was a reference to his *communication skills*. After the prospective client meeting, Kedkad asked Brown what he thought of the meeting. Kedkad might not have appreciated Brown's remark, but he certainly solicited it. Brown even based his opinion on information from Hoback that Kedkad made many mistakes in his proposals. Kedkad allegedly told Hoback of this March 2007 "learn some English" comment in the beginning of *February* 2007, which makes no logical sense.

Overall, Brown's alleged remarks were plainly trivial or offhand comments and are insufficient as a matter of law to support a hostile environment claim. For example, in Manatt v. Bank of America, 339 F.3d 792 (9th Cir. 2003), the plaintiff's coworkers called her "China woman" several times and, on several occasions, ridiculed her appearance and speech on the basis of her race. Id. at 795-796. The Ninth Circuit found that such behavior, although troubling, generally fell into the category of "simple teasing" and "offhand comments" and was not actionable. Id. at 799; Vasquez, 307 F.3d at 893 [no hostile work environment when plaintiff's supervisor made racially offensive remarks to plaintiff on two occasions and yelled at him in front of others]; Martinez, 349 F. Supp.2d at 1253 ["the casual utterance of several offensive racial slurs is not likely to be severe enough to constitute actionable hostile work environment harassment. If groping a woman's intimate body parts is insufficiently severe to make a single event actionable, then a handful

of racial epithets also seems insufficiently severe"].

Third, there is no evidence that the alleged racial remarks were in any way physically threatening. At best, they were mere offensive utterances. However, there is no evidence that the alleged remarks were made in the presence of or overheard by any of Kedkad's coworkers. Apparently, Brown only uttered the alleged remarks during one-on-one conversations with Kedkad.

Fourth, there is no admissible evidence that Brown's alleged racial remarks unreasonably interfered with Kedkad's work performance. Rather, during the time period in which Brown allegedly made these statements, Brown openly praised Kedkad for his sales efforts at the company. Kedkad was an *above* quota sales performer for the first quarter of 2007. He readily described himself as being "hard-working" and "very successful," and someone who does not "live [his] life based on what other people think."

Thus, there is also no evidence to satisfy this element of Kedkad's racial harassment claim as a matter of law.

B. Plaintiff Could Have Avoided Any Alleged Harassment if He Had Complied with KnowledgeStorm's Complaint Procedures under its No-Harassment Policy

Under the FEHA, an employer is strictly liable for all acts of unlawful harassment by a supervisor. "But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." State Dept. of Health Services v. Superior Court, 31 Cal.4th 1026, 1042 (2003) [("McGinnis")].

In an action under the FEHA against an employer for hostile environment racial harassment by a supervisor, an employer may plead and prove a defense based on the "avoidable consequences doctrine." McGinnis, 31 Cal.4th at 1044. To establish a defense under this doctrine, an employer must show that: "(1) the

employer took reasonable steps to prevent and correct workplace [racial] harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." Id.

"If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." McGinnis, 31 Cal.4th at 1045.

Here, Kedkad could have avoided any alleged harassment if he had complied with KnowledgeStorm's No-Harassment policy. First, KnowledgeStorm took reasonable steps to prevent and correct all forms of workplace harassment. In its Handbook, the company had a No-Harassment policy that required an employee who "is being harassed . . . or believes his/her employment is being adversely affected by such conduct" to "immediately report their concerns to" either "Mike Ewers, Vice-President" or "Kelly Gay, CEO." After his hire, Kedkad received a copy of the Handbook and even attended a training in the Atlanta office during which the company held a presentation on its employment policies and procedures, including its No-Harassment policy.

Second, Kedkad unreasonably failed to use the preventive and corrective measures that KnowledgeStorm provided in its No-Harassment policy. Kedkad never properly reported any of Brown's alleged racial remarks to Gay (or Ewers), until *months* later when he was the subject of a harassment complaint by Miller. Rather, Kedkad allegedly reported the alleged harassment to Hoback and in a dilatory fashion. Kedkad waited *over 30 days* to report the alleged "camel jockey" remark, which is arguably the most severe, to Hoback at the end of January 2007.

Likewise, Kedkad waited *a couple of weeks* before allegedly reporting the alleged "dress" remarks to Hoback. Further, he waited *over 30 days* before reporting the alleged "Indians in the area" remark to Hoback. Lastly, Kedkad allegedly informed Hoback of the March 2007 "learn some English" remark in the beginning of February 2007, which chronologically precedes the time period Kedkad would have known of the alleged remark. Certainly, Kedkad should have immediately reported these alleged racial remarks to Ewers or Gay when he believed Hoback was not taking any corrective action.

Lastly, Kedkad's reasonable use of the KnowledgeStorm's No-Harassment policy would have prevented all, or at the very least some, of the harm that Kedkad allegedly suffered. Kedkad advised Gay, *for the very first time*, that he believed there was discrimination ongoing in the South San Francisco office during the Miller investigation. Immediately after completing her interview of Kedkad regarding Miller's complaint, Gay commenced an investigation into Kedkad's complaint of discrimination. Notably, Kedkad does not allege any racial harassment by Brown after he complained to Gay in April 2007.

Thus, KnowledgeStorm should not be liable for any of the harm that Kedkad allegedly suffered prior to him making a complaint with Gay.

V. CONCLUSION

Based on the foregoing, KnowledgeStorm respectfully requests this court to grant its motion for summary judgment or, in the alternative, partial summary judgment against Kedkad.

Dated: April 29, 2008

FORD & HARRISON LLP

By: /s/ Steven M. Kroll
Jeffrey D. Mokotoff
Steven M. Kroll
Attorneys for Defendant
KNOWLEDGESTORM, INC.

PROOF OF SERVICE

I, Yolanda H. Dennison, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 350 South Grand Avenue, Suite 2300, Los Angeles, California 90071. On April 29, 2008, I served a copy of the within document(s):

DEFENDANT KNOWLEDGESTORM, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AGAINST PLAINTIFF MAHMOUD KEDKAD; MEMORANDUM OF POINTS AND AUTHORITIES

☒ (E-Mail/Electronic Transmission) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed on the attached service list. I did not receive, within a reasonable time after the submission, any electronic message or other indication that the transmission was unsuccessful pursuant to the CM/ECF system of the United States District Court for the Northern District of California.

☐ by placing the document(s) listed above in a sealed Overnite Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Overnite Express agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

VIA E-MAIL
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed this 29th day of April, 2008, at Los Angeles, California.

Yolanda H. Dennison